



May 23, 2002

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law & Police Division
City of Dallas
2014 Main, Room 501
Dallas, Texas 75201

OR2002-2785

Dear Ms. Middlebrooks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162632.

The City of Dallas Police Department (the "department") received a request for "any and all correspondence including electronic mail between police department command staff and the city manager or city attorney staff regarding the police narcotics division since Sept. 1, 2001 to present." You indicate that the requestor subsequently limited his request to only those documents pertaining to the "present fake drug investigation." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117, 552.119, and 552.130 of the Government Code. We have also received arguments from the Federal Bureau of Investigation in support of withholding the requested information. *See* Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted representative samples of information.¹

We begin by noting that this office has previously ruled on some of the submitted information in Open Records Letter Nos. 2002-2736 (2002) and 2002-2339 (2002). In those rulings, we determined that some of the same information at issue here was excepted from disclosure under sections 552.101 and 552.108 of the Government Code. However, this office also previously determined that some of the information at issue here was required to be released. You do not indicate, nor does it appear, that the facts and circumstances

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

surrounding our prior rulings have changed since the issuance of those rulings. Consequently, we find that you may rely upon Open Records Letter Nos. 2002-2736 (2002) and 2002-2339 (2002) as previous determinations to withhold the information we ruled could be withheld. *See* Open Records Decision No. 673 (2001). However, you must release the information we determined in Open Records Letter Nos. 2002-2736 (2002) and 2002-2339 (2002) must be released. *See* Gov't Code § 552.301(f). We have marked the information that is subject to the previous determinations.

With respect to the remainder of the submitted information, we note that the information contains search warrant affidavits that may be expressly open to the public. A search warrant affidavit is made public by statute if the search warrant has been executed. *See* Code Crim. Proc art. 18.01(b). Therefore, to the extent the search warrants corresponding with the submitted search warrant affidavits have been executed, the department must release the search warrant affidavits.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

Gov't Code § 552.022(a)(1), (3). The submitted information contains completed reports and evaluations as well as information in accounts, vouchers, and contracts relating to the receipt and expenditure of public funds by a governmental body. The completed reports and evaluations may be withheld if they are confidential under other law or excepted from disclosure under section 552.108 of the Government Code. The information in the accounts, vouchers, and contracts may only be withheld if it is expressly confidential under other law. Sections 552.103 and 552.108 are discretionary exceptions and are not "other law" for the purpose of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103). Therefore, the information in the accounts, vouchers, and contracts cannot be withheld under either section 552.103 or section 552.108. Nevertheless,

we will address your remaining assertion that this information is confidential under the Federal Rules of Criminal Procedure. We will also address whether some of the information in the accounts, vouchers, and contracts may be confidential under common-law privacy. On the other hand, the completed reports and evaluations may be withheld under section 552.108 or any other provision of law that makes the reports and evaluations confidential. Thus, while you may not withhold the completed reports and evaluations under section 552.103, we will address the remainder of your arguments, including your argument under section 552.108, with respect to that information.

We now turn to your argument that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with Federal Rule of Criminal Procedure 6. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Rule 6(e) of the Federal Rules of Criminal Procedure provides:

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Fed. R. Crim. P. 6(e)(2). Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by the general rule of secrecy may be made to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney duty to enforce federal criminal law." *See id.* 6(e)(3)(A)(ii). The submitted information consists of documents that were created or are maintained by the department. You indicate that the submitted information consists of grand jury subpoenas and information requested in those subpoenas. However, you have not shown that the department received the information as a result of being among the persons subject to the secrecy rule. *See id.* 6(e)(2), (3). Accordingly, we find that the information did not come into the possession of the department by operation of, or statutory exception to, the secrecy rule. *See id.* Moreover, section 6(e)(2) states that no obligation of secrecy may be imposed on any person except in accordance with this rule. *See id.* 6(e)(2). Accordingly, we cannot conclude that Rule 6 of the Federal Rules of Criminal Procedure makes the submitted information confidential.

The only other argument you make with respect to the information subject to section 552.022(a)(3) is that the identities of undercover officers and confidential informants are excepted from disclosure under section 552.101 and common-law privacy. Information may

be withheld under section 552.101 in conjunction with common-law privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* You assert that the named undercover officers and confidential informants would face an imminent threat of physical danger if their identities and specific undercover activities were released to the public. Based on your argument, we conclude that the identifying information of the undercover narcotics officers and the informants, which we have marked, is confidential under section 552.101 in conjunction with common-law privacy and must be withheld from the requestor. *See* Open Records Decision No. 169 (1977). However, the remainder of the information subject to section 552.022(a)(3) must be released.

With respect to the remainder of the submitted information, we note that some of the information is subject to the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have further found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records contained in the submitted information that are subject to the MPA and, therefore, may be released only in accordance therewith.

The submitted information also contains emergency medical services records. Section 773.091 of the Health and Safety Code provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

This confidentiality "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services." *Id.* § 773.091(g). Furthermore, section 773.092 of the Health and Safety Code provides for exceptions to the confidentiality of EMS records. Accordingly, the department must withhold the submitted EMS records according to sections 773.091 and 773.092 of the Health and Safety Code.

With respect to the information that is not otherwise subject to a previous determination, article 18.01(b) of the Code of Criminal Procedure, section 552.022(a)(3) of the Government Code, the MPA, or section 773.091 of the Health and Safety Code, we address your contention that the submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) of the Government Code provides in pertinent part that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure if "release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement or prosecution. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You indicate that the submitted information relates to a case that is under continuing investigation by the Federal Bureau of Investigations (the "FBI"). Indeed, in its letter to this office, the FBI states that the requested information relates to its ongoing public corruption

investigation and, therefore, disclosure of this information would interfere with its law enforcement efforts. Based on the submitted arguments and our review of the submitted information, we find that the release of the information “would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a); *see* Open Records Decision Nos. 372 at 4 (1983) (stating that where incident involving criminal conduct remains under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of related information), 493 at 2 (1988), 272 (1981); *see also* Attorney General Opinion MW-575 at 1-2 (1982) (construing statutory predecessor). Accordingly, pursuant to section 552.108, the department may withhold from disclosure the submitted information that is not otherwise subject to a previous determination, article 18.01(b) of the Code of Criminal Procedure, section 552.022(a)(3) of the Government Code, the MPA, or section 773.091 of the Health and Safety Code.

In summary, the department may rely on Open Records Letter Nos. 2002-2736 (2002) and 2002-2339 (2002) to withhold information we determined in those rulings to be excepted from disclosure under sections 552.101 and 552.108 of the Government Code. However, the department must release the information we determined in Open Records Letter Nos. 2002-2736 (2002) and 2002-2339 (2002) must be released. With respect to the information that is not subject to Open Records Letter Nos. 2002-2736 (2002) and 2002-2339 (2002), the department must release the information that we have marked 552.022(a)(3), with the exception of the information we have marked under section 552.101 and common-law privacy. The department must also release the submitted search warrant affidavits, which we have marked, if the corresponding search warrants have been executed. The department must withhold the marked medical records in accordance with the MPA. The department must also withhold the marked EMS records according to sections 773.091 and 773.092 of the Health and Safety Code. The department may withhold the remainder of the submitted information under section 552.108(a)(1) of the Government Code.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney

²Based on this finding we need not reach the remainder of your arguments.

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 162632

Enc: Submitted documents

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